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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1983

HOPI INDIAN TRIBE,

Petitioner,

vs.

JOHN R. BLOCK, Secretary of Agriculture; NED D. BOYLEY, Acting Assistant Secretary of Agriculture for Natural Resources and Environment; R. MAX PETERSON, Chief Forester of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John Paul Kennedy, Scott C. Pugsley
BOYDEN, KENNEDY & ROMNEY
1000 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133
Telephone: (801) 521-0800

Attorneys for Petitioner

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QUESTIONS PRESENTED

1. Whether American Indians are protected by the free exercise of religion clause of the first amendment to the United States Constitution in the same way and to the same extent as are other United States citizens, especially in light of the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (Supp. V 1981)?

2. Whether American Indians asserting that a proposed private commercial-recreational development on National Forest lands will seriously disrupt and harm their native religious culture, beliefs, and practices should be subject to a different and higher standard of proof than would apply to other Americans claiming the protections of the free exercise clause of the first amendment against federal government action? Specifically, must American Indians who claim that a proposed discretionary commercial-recreational development of National Forest lands will desecrate their religious shrines and seriously disrupt their religious beliefs and practices, show that such use of the lands will either penalize them for their religious faith and beliefs or impair their religious practices which cannot be performed at any other site, as a condition precedent to a traditional judicial free exercise clause evaluation of alternatives and balancing of interests otherwise applied to government-imposed burdens on religion?

3. Whether the American Indian Religious Freedom Act, 42 U.S.C. § 1996, imposes upon the federal administrators of National Forest lands a duty to protect and preserve American Indian religious beliefs and prac-

tices when such beliefs and practices will be destroyed or seriously disrupted by a proposed private commercial-recreational development of such lands, and if so, to what extent should such protection be afforded?

PARTIES TO THE PROCEEDINGS BELOW

The parties to CA. No. 81-1912 are listed in the caption to this petition.

The parties to CA. No. 81-1905 were Richard F. and Jean Wilson, plaintiffs-appellants, and John R. Block, Secretary of Agriculture; R. Max Peterson, Chief Forester of the United States; and Northland Recreations, Inc., an Arizona corporation, defendants-appellees.

The parties to CA. No. 81-1956 were the Navajo Medicinemen's Association and named Navajo and Hopi Indians,[1] plaintiffs-appellants, and Block, Peterson, and Northland (identified above); plus the United States Forest Service, Department of Agriculture; and the United States of America, defendants-appellees.

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[1] **Faye B. Tso; Ashee Begay, Sr.; Tom Watson, Sr.; Miller Nez; Frank Bluehorse; Fred Stevens, Jr.; Francis D. Tsosie; Jim Charley; Hoskie Tom Becenti; Tony Trujillo; Jacob Poleviyaoma, Sr.; Jacob Poleviyaoma, Jr.; Jerry R. Sekayumptewa; and Lavern Siwumptewa.**

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RELIEF REQUESTED

Petitioner, the Hopi Tribe, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 20, 1983.

OPINIONS IN THE COURTS AND AGENCY BELOW

The opinion of the court of appeals, *Wilson v. Block*, (App. 'A", pp. 1-50) is reported at 708 F.2d 735-760 (D.C. Cir. 1983). The June 15, 1981 (App. "B", pp. 51-89) and May 14, 1982 (App. "C", pp. 93-102) memorandum opinions of the district court have not been officially reported, although portions of the June 15, 1981 memorandum opinion have been reprinted in the *Indian Law Reporter*, Vol. 8, pp. 3073-79.

The initial decisions of the Forest Supervisor, dated February 27, 1979 (App. "D", pp. 103-111), the Regional Forester, dated February 7, 1980 (App. "E", pp. 113-131), and the Chief of the Forest Service, dated December 31, 1980 (App. "F", pp. 133-145), are neither officially nor unofficially reported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1983. (App. "G", p. 147.) Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* which was denied on July 14, 1983. (App. "G", pp. 148-49.) A similar petition by the Navajo Medicinemen's Association was denied July 26, 1983. (App. "G", pp. 150-51.) No such petition was filed by Richard F. and Jean Wilson, who have separately petitioned this Court for a writ of certiorari regarding other issues dealt with in the May 20, 1983, opinion of the court of appeals. No order has been entered extending the time for this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Article I, Section 8, Clause 3:

   The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

2. United States Constitution, Article IV, Section 3, Clause 2:

   The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to United States; . . . .

3. United States Constitution, First Amendment:

   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . .

4. The American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (August 11, 1978):

   Whereas the freedom of religion for all people is an inherent right, fundamental to the democratic structure of the United States and is guaranteed by the First Amendment of the United States Constitution;

   Whereas the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion and, as a result, has benefited from a rich variety of religious heritages in this country;

Whereas the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems;

Whereas the traditional American Indian religions, as an integral part of Indian life, are indispensable and irreplaceable;

Whereas the lack of a clear, comprehensive, and consistent Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians;

Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;

Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of their effect on traditional American Indian religions;

Whereas such laws and policies often deny American Indians access to sacred sites required in their religions, including cemeteries;

Whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies;

Whereas traditional American Indian ceremonies have been intruded upon, interfered with, and in a few instances banned: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, [Section 1.] That henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Sec. 2. The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to the Congress the re-

sults of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action.

(Pub. L. No. 95-341 §1 is codified at 42 U.S.C. § 1996 (Supp. V 1981) and is referred to herein as "AIRFA".)

STATEMENT OF THE CASE AND THE MATERIAL FACTS

This case concerns whether or not, in light of the religious claims and interests of the Hopi and Navajo Indians, the respondents, as officers of the United States Department of Agriculture and its Forest Service, have properly decided to issue permits for the expanded commercial-recreational development and use of a ski resort north of Flagstaff, Arizona, known as the Snow Bowl. The Snow Bowl is a 777 acre area located on the San Francisco Peaks (the "Peaks") in the Coconino National Forest. The National Forest is managed for the United States by the respondents and their subordinates. The Snow Bowl is a private commercial development operated under permit from the respondents.

Petitioner is a federally recognized American Indian tribe. It brought this action on its own behalf and on behalf of its approximately 9,000 members. The other plaintiffs-appellants before the courts and agency below are an association of Navajo Indian religious practitioners known as the Navajo Medicinemen's Association, several individual Navajo and Hopi Indians, and a non-Indian couple who are owners of lands located adjacent to the permit area on the Peaks. In addition to the 9,000 members of the Hopi Tribe, there are approximately 160,000 Navajos residing in the Hopi and Navajo Reservations to the northeast of the Peaks. *See Wilson v. Block*, 708 F.2d 735 at 738. (App. "A", p. 4.)

To petitioner, its members, and the other Indian plaintiffs, the Peaks are of a sacred religious character. The Peaks are directly involved in both practices and beliefs central and indispensable to the Indian plaintiffs in the practice of their traditional native religions. *See id.* at 740. (App. "A", pp. 4-5.) The commercial-recreational development of the Peaks in issue which the respondents have approved would be, in the opinion of the Indian plaintiffs, "a profane act, and an affront to their deities"; would cause the Peaks to "lose their healing power and otherwise cease to benefit the tribes"; would "impair their ability to pray, . . . conduct ceremonies, . . . and . . . gather from the Peaks the sacred objects . . . which are necessary to their religious practices." *Id.* at 740. (App. "A", p. 8.) The Indian plaintiffs believe such development "is grossly inconsistent with their beliefs" and that the development will "lead to serious adverse consequences for their peoples." *Id.* (App. "A", p. 9.) The court of appeals' opinion also quotes the testimony of the then Chairman of the Hopi Tribe as follows:

> It is my opinion that in the long run if the expansion is permitted, we will not be able successfully to teach our people that this is a sacred place. If the ski resort remains or is expanded, our people will not accept the view that this is the sacred Home of the Kachinas. The basis of our existence as a society will become a mere fairy tale to our people. If our people no longer possess this long-held belief and way of life, which will inevitably occur with the continued presence of the ski resort . . . a direct and negative impact upon our religious practices [will result]. The destruction

> of these practices will also destroy our present way of life and culture.[2]

Id. n.2. (App. "A", p. 10.)

Notwithstanding this evidence recited in the court of appeals' opinion, that court ruled that the free exercise clause of the first amendment was not implicated by the proposed development, *i.e.*, that no constitutionally protected "burden" on religion had been shown, and it refused to proceed to conduct a traditional weighing of interests between the Indian religious beliefs and practices and the governmental interest in allowing a private commercial permittee to expand the Snow Bowl resort facilities, including an evaluation of less religiously intrusive alternatives.

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[2] **Compare Wisconsin v. Yoder**, 406 U.S. 205, 218-19 (1972):

> The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interferring with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practices of the Amish faith, both as to parent and child.
>
> . . .
>
> As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into the society at large, or be forced to migrate to some other and more tolerant region.
>
> In sum, the unchallenged testimony . . . support[s] the claim that enforcement of . . . compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondent's religious beliefs.

Prior to commencing this action, the plaintiffs below had all exhausted their administrative remedies within the Forest Service, United States Department of Agriculture. The Coconino National Forest Supervisor had rejected the several alternatives proposed in an Environmental Impact Statement ("EIS"), choosing instead what he called the "Preferred Alternative," of additional development for the Snow Bowl resort, its roads, ski lifts and associated facilities. *See* App. "D", pp. 103-111. Among the alternatives identified in the EIS as possible, lawful alternatives in regard to development of the Snow Bowl, but not chosen, were one to remove all recreational improvements from the Peaks and another simply to maintain the status quo, *i.e.*, permit existing developments to remain but allow no additional developments. The EIS recognized that these alternatives could lawfully be chosen without adversely affecting any vested property rights or interests.

The Forest Supervisor concluded that because input had been obtained from Indian religious practitioners, and because the Indians would still have access to the Peaks following the additional development, that the requirements of the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. §1996 (Supp. V 1981), had been met, and, therefore, the claimed adverse effect on the native religions would not deter the authorization of additional development pursuant to the "Preferred Alternative." *See* App. "D", pp. 103-111. The Final Environmental Impact Statement noted that "development will be considered adverse to the Native American religious

beliefs because commercial use and construction are not consistent with protecting the sacredness of the area."

That decision was appealed to the Regional Forester who, recognizing that "the expansion [approved by the Forest Supervisor] could violate the rights of American Indians to practice their religions," App. "E", p. 116, balanced that interest against a claimed public interest in greater development of the Snow Bowl. The Regional Forester concluded that the Forest Supervisor's decision should be modified to permit only the repair and replacement of existing facilities for compelling safety reasons; the "Preferred Alternative" of defined expansion was disapproved. *See* App. "E", pp. 113-131. The Regional Forester noted that "[t]he Snow Bowl . . . is not an outstanding winter sports area when measured against national standards, nor can it ever be made into one." App. "E", p. 129.

The decision of the Regional Forester was appealed to the Chief of the Forest Service. The Chief reversed the decision of the Regional Forester and restored the decision of the Forest Supervisor "which conditionally authorizes construction of additional facilities and reconstruction and improvement of the Snow Bowl Road." App. "F", p. 144.

The Secretary of Agriculture refused to undertake further review of the Chief Forester's decision.

The additional facilities authorized under the Pre-

ferred Alternative include 50 acres of new cleared ski runs (a 32% increase), a new ski lodge (a 100% increase), increased parking, widening and paving of the access road, and the construction of three new ski lifts (a 300% increase).

The Indian plaintiffs, including the petitioner, claimed below that such expansion would have a substantial adverse effect on their traditional native religious beliefs and practices. *See, e.g.*, 708 F.2d at 742: (App. "A", p. 13.)

> Because the plaintiffs' religions are, in this sense, site specific, development of the Peaks would severely impair the practice of the religions if it destroyed the natural conditions necessary for the performance of ceremonies and the collection of religious objects. The plaintiffs claim that the Preferred Alternative will impair their religious practices in precisely that manner.

Each plaintiff initiated a separate lawsuit to challenge the decision of the respondents and their subordinates to allow the expansion of the Snow Bowl facilities pursuant to the Preferred Alternative. Petitioner asserted jurisdiction under 28 U.S.C. §1331 (Supp. V 1981) (federal question), 28 U.S.C. §1361 (1976) (mandamus), 28 U.S.C. §1362 (1976) (action by an Indian tribe), 28 U.S.C. §§2201-2202 (1976) (declaratory judgment and further relief), and 5 U.S.C. §§701-706 (1976) (judicial review of administrative action). The three cases were consolidated before the district court and an expedited decision was rendered based upon stipulated facts and

written witness statements. 708 F.2d at 739. (App. "A", pp. 6-7.)

The district court rejected the plaintiffs' claims on all issues, except that it remanded the case for compliance with the National Historic Preservation Act, 16 U.S.C. §§470-470n (Supp. V 1981). Following administrative consideration of the remanded issue, final judgment was entered by the district court dismissing all of the plaintiffs' claims.

The Indian plaintiffs each appealed the decision of the district court rejecting their claims under the first amendment and AIRFA. In an opinion dated May 20, 1983, the Court of Appeals for the District of Columbia Circuit affirmed the decision of the district court in all respects.[3] That court held that the Indian plaintiffs had not demonstrated that the governmental action in question burdens their religious beliefs or practices and, thus, that there was no free exercise infringement proven which would necessitate a judicial weighing of governmental interests against religious interests, or which would require a judicial inquiry into less intrusive alternatives.

Specifically, the court of appeals held that in order to demonstrate a burden on religion, and thereby invoke the protections of the free exercise clause, the plaintiffs must demonstrate either that the proposed government

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[3] The decisions of the courts below also included consideration of other issues besides AIRFA and the free exercise clause for which review is not sought in this petition. Some of those issues are raised in a petition for certiorari filed by Richard F. and Jean Wilson.

land use would "penalize adherence to religious belief" or "penalize[ ] the plaintiffs for their beliefs," 708 F.2d at 741-42, (App. "A", p. 12), or that such government land use "would impair a religious practice that could not be performed at any other site." *Id.* at 744. (App. "A", p. 16.) The court of appeals concluded that "[a]s the plaintiffs have not shown that development will burden them in their religious beliefs and practices, we need not decide whether the ski area expansion is a compelling governmental interest, or whether the Preferred Alternative is the least restrictive means of achieving that interest." *Id.* at 745. (App. "A", p. 19.)

The Indian plaintiffs' timely Petitions for Rehearing and for Rehearing *En Banc* were each denied by the court of appeals. *See* App. "G", pp. 147-151.

The Indian plaintiffs have not sought in this litigation to have the Peaks designated as an Indian religious shrine from which non-Indians would be barred. *Compare Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981). Rather, plaintiffs have sought to have the defendants take either of the permissible, lawful alternatives identified in the EIS which would not adversely affect the Indian religious interests.

REASONS AND ARGUMENT FOR GRANTING THE PETITION

I.

THERE IS A NEED FOR THIS COURT TO ESTABLISH THAT ADHERENTS OF TRADITIONAL NATIVE AMERICAN RELIGIONS

ARE ENTITLED TO THE FULL PROTECTIONS OF THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

The courts below in this case have cut off nearly 170,000 Hopi and Navajo Indians from the protections of the free exercise clause of the first amendment by finding that the claimed desecration of the Indians' most sacred religious beliefs and practices as the result of discretionary government action does not amount to a constitutionally implicated "burden" on the followers of those religions. The decisions of the courts below allow the Forest Service to sacrifice the traditional religious beliefs and practices of the Hopi and Navajo Indians, as well as the native cultures which are so closely tied to such traditional religious beliefs and practices, to the commercial development of a mediocre ski resort by a private permittee on National Forest lands. Significantly, by characterizing the effect on the Indian religions as something less than a "burden" in the constitutional sense, the courts below have allowed the disruptive private development to proceed without conducting a traditional balancing of interests test to determine whether some public interest outweighs the claimed need to preserve the Indian religions, and without identifying whether less intrusive alternatives could be employed to lessen the impact on the Indian religions. *Compare Thomas v. Review Board*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

The facts here, coupled with the large number of Indians affected and the two major Indian cultures at

stake, establish in this case a clear need for this Court to clarify whether or not adherents of traditional native American religions are entitled to the same kind and degree of protection under the free exercise clause of the first amendment, as are other American citizens in the beliefs and practices of other religions. Unless reviewed and corrected by this Court, the decisions of the courts below will stand as precedent to other courts that free exercise claims of American Indians should be subjected to a threshold standard of proof higher than that applied to the free exercise claims of any other religious group as a condition precedent to a traditional judicial weighing of interests and consideration of alternatives.

All of the Indian plaintiffs' evidence was to the effect that their religious beliefs and practices would in fact be significantly and fundamentally burdened by the expansion of the Snow Bowl which is in issue. It is the fact of such a real, proven burden on religion, and not its precise nature, which should have been held to trigger the protections of the free exercise clause. "For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.'" *Sherbert v. Verner*, 374 U.S. at 404, quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961). *See also Thomas v. Review Board*, 450 U.S. at 717-18: "Where the state . . . [puts] substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden on religion exists. While the compulsion may be indirect, the infringement upon free exercise is

nonetheless substantial." Once the desecration of the Peaks is allowed to occur, the Indians will necessarily have to modify their religious beliefs and practices which center therein.

Burdens on the free exercise of religion far less egregious than those at stake in this case have been recognized by this court as entitled to first amendment consideration and its required balancing of interest analysis. *See Bob Jones University v. United States*, 51 U.S.L.W. 4593, 4601 (U.S. May 24, 1983) (denial of tax benefits will have a substantial impact on operation of private religious school but will not prevent that school from observing its religious tenets; compelling governmental interest in reducing racial discrimination held to overbalance religious interest). *See also United States v. Lee*, 455 U.S. 252 (1982) (payment of social security taxes interferes with free exercise rights of Amish farmer and carpenter, yet does not destroy basis for religion; taxes required to be paid because of overriding government interest in maintaining the social security system). *Compare Thomas v. Review Board*, 450 U.S. 707 (1981) (denial of unemployment benefits to employee who refused to work on the Sabbath day held not justified by government need to maintain its benefit scheme). Petitioner submits that the burden on the Hopi religion and religious culture which this case threatens is identical in kind, but greater in degree, to that recognized as protected by the first amendment for the Amish people in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See* footnote 2 above.

These cited cases demonstrate that the inability of a religion either to survive doctrinally or to carry on religious practices despite a complained-of government infringement are not the criteria in other contexts for judging whether or not there is a "burden" on the free exercise of religion. The higher burden of proof imposed by the courts below in this case as a barrier to free exercise analysis for the plaintiff Indians represents both an improper allocation of the risk of an erroneous decision between religious freedoms and public land administration, and an improper indication that Indian religious interests are of lower relative importance than other religious interests. *Compare Addington v. Texas*, 441 U.S. 418, 423 (1979).[4] That approach is hardly consistent with what this Court has recognized as "[t]he overriding duty of our Federal Government to deal fairly with Indians wherever located," *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

Indeed, *United States v. Lee*, 455 U.S. 252 (1982), establishes that, except for bizarre or clearly non-religious claims, it is the religious adherents themselves, and not the courts, who should determine whether or not the practice of one's religion is burdened by government action.

> It is not within "the judicial function and judicial competence," however, to determine whether ap-

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[4] **And see** Boothby, **Government Entanglement With Religion: What Degree of Proof is Required?**, 7 Pepperdine L. Rev. 613 (1980) (urging that in cases of government infringement on religious interests protected by the first amendment, the government should be required to prove by clear and convincing proof both that a compelling state interest exists and that the governmental action is the least intrusive alternative available).

> pellee or the Government has the proper interpretation of the Amish faith; "[c]ourts are not arbiters of scriptural interpretation." [citing *Thomas*, 450 U.S. at 716.] We therefore accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith. Because the payment of taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights.

455 U.S. at 257.

Certainly the claimed desecration of a faith's central religious beliefs and practices would, for any other religion, implicate the free exercise clause and its balancing test. This Court needs to establish that no less protection should be afforded, and no higher burden of proof imposed, simply because the plaintiffs are American Indians and because the government action involves the administration of public lands.

II.

THIS COURT SHOULD CLARIFY WHETHER THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT MEANS WHAT IT SAYS.

In 1978, Congress enacted what is known as the American Indian Religious Freedom Act, codified in part at 42 U.S.C. § 1996 (Supp. V 1981). The entire Act is set forth above in the Statutory Provisions Involved section. The codified portion of that Act provides as follows:

> On and after August 11, 1978, it shall be the policy of the United States to *protect and preserve*

> for American Indians their inherent right of freedom to believe, express, *and exercise the traditional religions* of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to *access to sites, use and possesion of sacred objects*, and the freedom to worship through *ceremonials and traditional rites.*

(Emphasis supplied.)

As AIRFA recognizes, and as the court of appeals acknowledged, 708 F.2d at 742, (App. "A", p. 13), Indian religions are frequently "site-specific."[5] As in the instant case, such sites are frequently on public lands and their use for Indian religious purposes frequently conflicts with otherwise lawful uses of such lands.[6]

Both of the courts below have construed AIRFA as doing nothing more than securing to Indians the same rights to the free exercise of religion enjoyed by other, more powerful religions in American society. *See* 708 F.2d at 745-47. (App. "A", pp. 19-23.) By construing AIRFA in such a way as to invite federal officials to merely consider, but not to "protect [or] preserve" In-

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[5] **Compare Pillar of Fire v. Denver Urban Renewal Authority, 181 Colo. 411, 509 P.2d 1250, 1254 (1973): "[R]eligious faith and tradition can invest certain structures and land sites with significance which deserves First Amendment protection."**

[6] **The Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§528-531 (1976), does not mandate that National Forest lands be utilized contrary to the religious interests of Indians. Like AIRFA, 16 U.S.C. § 528 sets a "policy" for the government. In addition, the definition of "multiple-use" recognizes "that some land will be used for less than all of the resources . . . with consideration given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output." 16 U.S.C. § 531(a).**

dian religious beliefs and practices as AIRFA expressly necessitates, the courts below have emasculated AIRFA.[7] Petitioner submits that as United States citizens (*see* 43 Stat. 253 (1924), now codified as part of 8 U.S.C. §1401 (1976)), American Indians were already entitled to the full range of first amendment protections enjoyed by other citizens vis-a-vis the actions of the federal government. *See generally* F. Cohen, *Handbook of Federal Indian Law*, 645 (1982 ed.). The interpretation of AIRFA given by the courts below thus renders AIRFA both meaningless and unnecessary. "There is a presumption against a construction which would render a statute ineffective." *United States v. Powers*, 307 U.S. 214, 217 (1939).

The proper construction of AIRFA should have been reached pursuant to the rule that "statutes passed for the benefit of dependent Indian Tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976), quoting from *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). The right of Indians to practice their site-specific and object-oriented religions should be recognized as what Congress has said it is, namely an "inherent right." The obliga-

[7] Section 2 of Pub. L. No. 95-342, of which 42 U.S.C. § 1996 is section 1, instructed the President to direct the various federal departments to evaluate their policies and procedures in consultation with traditional native religious leaders and to determine and report to Congress any changes necessary to preserve Native American religious cultural rights and practices. See the Constitutional and Statutory Provisions Involved section, above. Thus, the consultation with Indian religious leaders which the defendants have undertaken in this case conforms to Section 2 of AIRFA, leaving Section 1 (i.e., 42 U.S.C. § 1996), uncomplied with.

tion of the federal defendants should be declared to be what Congress has said it shall be, namely to "protect and preserve" American Indian religious beliefs and practices. The "freedom to worship" at desecrated sites or with desecrated objects are hardly the kinds of rights Congress believed it was protecting for Native Americans when it passed AIRFA.[8]

This case demonstrates how meaningless AIRFA becomes when it is construed to require nothing more than Indian input into federal decision making regarding the use of federal lands. Petitioner and the other Indian plaintiffs claim that the development in question will, for example, "destroy[] the natural conditions necessary for the performance of ceremonies and the collection of religious objects," 708 F.2d at 742, (App. "A", p. 13), and that "[t]he destruction of these practices will also destroy our present way of life and culture." *Id.* at 741 n.2. (App. "A", p. 10.) The respondents' own EIS identified as possible, lawful alternatives either the removal of the recreational facilities or their maintenance in a status quo condition. The respondents and their

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[8] The protection of first amendment rights is a traditional function of the federal government. **See United States v. Reese, 92 U.S. 214, 217 (1876):**

> **Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected.**

The protection of American Indians is likewise a traditional function of the federal government. See e.g., United States v. Mitchell, 51 U.S.L.W. 4999 (U.S. June 27, 1983) ("general trust relationship between the United States and Indian people"); 25 U.S.C. §§ 1301-1341 (1976) (the Indian Civil Rights Act).

subordinates have, nevertheless, decided that instead of taking any action to "protect and preserve" such threatened Indian religions, they will approve, without modification or restriction, the expansion of a mediocre commercial ski resort serving only a very small proportion of the public, and potentially greatly benefiting one private commercial permittee. That project will cause the complained-of harm to the native religions and to the Indian cultures so largely predicated on those religions. Mere consideration of Indian input should not be allowed to stand as a substitute for either abiding the "policy" set by AIRFA, or conducting the analysis and consideration to which free exercise rights are entitled under this Court's decisions in *Yoder* and *Sherbert*.

If AIRFA was not intended to mean what it says concerning preservation and protection of Indian culture and religions, then this Court should put the issue to rest by definitively so declaring. If, however, AIRFA represents some meaningful exercise of Congress' authority to set federal policy, to control public lands, and to administer Indian affairs, then this Court should likewise so declare before irreparable harm is done to the religious beliefs and practices, and to the underlying culture, of the Hopi and Navajo Indians.

The problems typified by this case are common and recurring among Indian tribes generally. The religious interests at stake are among the most fundamental which our society recognizes. *See, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979); *Murdock v. Pennsylvania*, 319 U.S. 105, 109, 115 (1943). Where

as here, the religious beliefs and practices of two major Indian tribes are to be sacrificed to the expansion of a private recreational enterprise on federal land, further review by this Court is warranted.

III.

THE DECISION BELOW CONFLICTS WITH THE MOST RECENT SUBSEQUENT FEDERAL COURT DECISION CONSIDERING NEARLY IDENTICAL FACTS.

In an opinion dated May 24, 1983, the United States District Court for the Northern District of California entered a decision on substantially identical facts to those in this case, but reaching the opposite result under the free exercise clause. *See Northwest Indian Cemetery Protective Association v. Peterson*, 565 F. Supp 586 (N.D. Cal. 1983).[9]

While that case, because of the recent date of its decision, has not yet resulted in a conflicting decision of the court of appeals, petitioner respectfully suggests that the opposite result reached therein on the free exercise issue demonstrates the need for clarification by this Court of the applicability of the first amendment's free

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[9] Other cases considering AIRFA and/or Indian free exercise rights have reached differing results on divergent bases. **See, e.g., Badoni v. Higginson**, 638 F.2d 172 (10th Cir. 1980), **cert. denied**, 452 U.S. 954 (1981); **Sequoyah v. Tennessee Valley Authority**, 620 F.2d 1159 (6th Cir. 1980), **cert. denied**, 449 U.S. 953 (1980); **Inupiat Community of Arctic Slope v. United States**, 548 F.Supp. 182 (D. Alaska 1982); **Crow v. Gullet**, 541 F.Supp. 785 (D. So. Dak. 1982); **People v. Woody**, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); **Frank v. State**, 604 P.2d 1068 (Alaska 1979).

exercise clause to the religious beliefs and practices of American Indians on public lands.[10]

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

John Paul Kennedy

Scott C. Pugsley

BOYDEN, KENNEDY & ROMNEY
1000 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133
Telephone: (801) 521-0800
Counsel for Petitioner

Dated: _____

[Appendix separately printed and filed.]

[10] The need for this court to clarify the nature and extent of American Indian rights under the free exercise clause has been recognized in law review materials considering the issue. See Note, **Native American Free Exercise Rights to the Use of Public Lands**, 63 B. U. L. Rev. 141 (1983); Note, **Native Americans and the Free Exercise Clause**, 28 Hastings L.J. 1509 (1977).